



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2003

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Division
City of Dallas
1400 South Lamar Street #300A
Dallas, Texas 75215-1801

OR2003-7727

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190237.

The City of Dallas Police Department (the "department") received a request for the internal affairs, public integrity, academy, training, and personnel records of a named police officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have reviewed the representative sample of information you submitted and considered the exceptions you claim.¹

Section 552.101 of the Government Code excepts from disclosure "information made confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information another statute makes confidential. The submitted documents contain fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. They provide as follows:

¹We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the department must withhold the fingerprints under section 552.101 in conjunction with section 559.003 of the Government Code.

The submitted documents also contain confidential criminal history record information ("CHRI"). Criminal history record information generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990).

The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Furthermore, "[n]o agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself." 28 C.F.R. § 20.21(c)(2). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Some of the information submitted for our review is CHRI generated by TCIC and NCIC. Accordingly, we have marked the information that is excepted from required public disclosure by section 552.101 of the Government Code.

You claim that a portion of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. Based on our review of your arguments and the submitted information, we agree that a portion of the submitted information contains information that was acquired from a polygraph examination. It does not appear that any of the exceptions in section 1703.306 apply in this instance. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we conclude that the department must

withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Also among the documents you submitted to this office is the psychological evaluation of the named police officer. The release of this information is governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code makes confidential “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” See also Health & Safety Code § 611.001 (defining “patient” and “professional”). In this instance, the evaluation was created by a police psychologist. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals, including “a person who has the written consent of the patient.” Health & Safety Code § 611.004(a)(4). We conclude that the department may release the psychological evaluation that you have submitted only in accordance with the access provisions of chapter 611. Health & Safety Code § 611.002(b); see *id.* §§ 611.004, 611.0045.

Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information when (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual’s criminal history when compiled by a governmental body, see Open Records Decision No. 565 (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), and personal financial information not relating to a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990). Having reviewed the submitted information, we find that some of the information is protected by common-law privacy and must therefore be withheld pursuant to section 552.101. We have marked this information.

Next, we address your arguments under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024.² Therefore, the department must withhold the information we have marked

² “Peace Officer” is defined by article 2.12 of the Code of Criminal Procedure.

under section 552.117(a)(2). We note that some of the information you have marked is not excepted under section 552.117(a)(2) and may not be withheld on that basis. Thus, the department must only withhold the information we have marked under section 552.117.

Finally, section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state. Gov't Code § 552.130(a)(1). Accordingly, you must withhold the Texas motor vehicle information we have marked.

In summary, the department must withhold the biometric information we have marked under section 552.101 in conjunction with section 559.003. The department must withhold any responsive CHRI obtained from DPS or any other criminal justice agency under section 552.101 in conjunction with Chapter 411 of the Government Code. The department must withhold the information acquired from the polygraph examination which we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. The department must withhold the psychological evaluation we have marked in accordance with chapter 611 of the Health & Safety Code. Private information we have marked must also be withheld under section 552.101. Section 552.117 information pertaining to the officer must be withheld, and the department must withhold the Texas driver's license and motor vehicle information under section 552.130. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 190237

Enc. Submitted documents

c: Ms. Tanya Eiserer
The Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)